UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| WAUSAU UNDERWRITERS INSURANCE COMPANY,<br><br>Plaintiff,<br><br>-against-<br><br>OLD REPUBLIC GENERAL INSURANCE COMPANY,<br><br>Defendant. | Civil Action No.<br>14 Civ. 3019 (JMF)(HBP) |

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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF WAUSAU UNDERWRITERS INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT**

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Wausau[1] submits this reply memorandum of law in further support of its motion for summary judgment.

Contrary to Old Republic's argument, direct on-point New York precedent addressing the exact language of the Old Republic Policy establishes that its additional insured endorsements are not limited to vicarious liability. With respect to the duty to defend, Old Republic's argument that the motion is premature is simply wrong. The duty to defend is based upon the allegations of the Underlying Action and not upon determinations of actual liability. With respect to the duty to indemnify, if this Court determines that a claim by an employee of a prospective subcontractor visiting a jobsite to meet with the Named Insured to bid a job should be treated the same as a claim by an employee of a subcontractor, then Old Republic as a matter of law owes the duty to indemnify under New York Court of Appeals precedent.

Old Republic does not dispute the priority of coverage or the amount of recoverable defense costs.

Old Republic's late notice argument is patently frivolous.

## STATEMENT OF FACTS

Old Republic, in Defendant's Response to Plaintiff's Statement of Undisputed Facts, other than the contents of letters set forth in paragraphs 9, 13, 14, 15, 17, and a miscitation of a date in paragraph 65, does not dispute the facts set forth in Plaintiff's Statement of Undisputed Facts. At this late date, it is not enough for Old Republic to state that it "can neither confirm nor deny." As Local Civil Rule 56.1(c) makes clear, "[e]ach numbered paragraph in the statement of material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly

[1] We continue to use the terms defined in Wausau's moving memorandum of law herein.

numbered paragraph in the statement required to be served by the opposing party." Pursuant to Local Civil Rule 56.1(d), to deny a fact, Old Republic must provide a "citation to evidence which would be admissible." See, e.g., Baity v. Kralik, No. 12-CV-510 (KMK), 2014 WL 5010513, at *1 (S.D.N.Y. Sept. 30, 2014); Senno v. Elmsford Union Free Sch. Dist., 812 F. Supp. 2d 454, 458 n.1 (S.D.N.Y. 2011).

Old Republic, relying upon inadmissible hearsay purportedly made in the context of a mediation before the Magistrate Judge, improperly raises a meritless argument that Wausau somehow caused Burawski's counsel to commence suit against McGowan. Not only is this a violation of the confidentiality agreement agreed to by the parties of the arbitration, it is untrue and an irrelevant red-herring.[2] The Amended Complaint in the Underlying Action was filed on September 4, 2013. It is more than 18 months later. McGowan, being defended by Old Republic, is still a party and has not moved for summary judgment and has not been dismissed from the Underlying Action. While it matters not why Burawski's counsel made the decision to sue McGowan, Old Republic cannot dispute that McGowan, as a codefendant in the Underlying Action, may be held responsible, in part, for the injuries alleged in the Underlying Action.

## ARGUMENT

### Point I

### CARLYLE AND 170 BROADWAY QUALIFY AS ADDITIONAL INSUREDS UNDER THE OLD REPUBLIC POLICY

Contrary to Old Republic's arguments, its additional insured endorsements do **not** only provide coverage for vicarious liability. Old Republic's citation of Wilson Cent. Sch. Dist. v. Utica Mut. Ins. Co., 123 A.D.3d 920, 921, 999 N.Y.S.2d 440 (2d Dep't 2014), is misplaced

[2] Jason George simply opined to Burawski's counsel that McGowan was a responsible party. Burawski's counsel made the decision to join McGowan to the action.

because the policy at issue therein contains the narrower language, "to the extent such additional insured is held liable for", that is not in the Old Republic Policy. The other case Old Republic cites, National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co., 103 A.D.3d 473, 474, 962 N.Y.S.2d 9 (1st Dep't 2013), does not stand for the proposition Old Republic asserts. Rather, it stands for the proposition that the "caused by an act or omission" language in an additional insured endorsement does not require negligence and is treated the same as an " arising out of operations" type endorsement. Id. at 475, 962 N.Y.S.2d at 9. Indeed, in National Union v. Greenwich Ins. Co., the First Department followed the New York Court of Appeals ruling in Regal Const. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 15 N.Y.3d 34, 38, 904 N.Y.S.2d 338, 341 (2010), which held that the "arising out of the [Named Insured's] ongoing operations" additional insured endorsement is automatically satisfied when the underlying claimant is an employee of the Named Insured. Indeed, it is automatically satisfied when the underlying claimant is an employee of a subcontractor of the Named Insured. Cheektowaga Cent. Sch. Dist. v. Burlington Ins. Co., 32 A.D.3d 1265, 1267, 822 N.Y.S.2d 213, 214 (4th Dep't 2006). Old Republic concedes this point in its brief:

> While typically additional insured endorsements in the construction context are interpreted broadly, allowing for coverage regardless of the additional insured's negligence, this is done only where the claimant is injured while engaged in work on behalf of a subcontractor whose work was covered by the relevant policy, and/or was employed directly or indirectly by a subcontractor. *Virginia Surety Co. Inc.* v. *Travelers Property Cas. Co. of Amer.,* 950 N.Y.S.2d 494 (Sup. Ct. NY 2012).

(See Defendant's Mem. of Law in Opp. ["Opp. Memo"], p. 9.)

Old Republic's argument that the duty to defend cannot be determined until liability in the Underlying Action has been determined is contrary to New York law. "A duty to defend is triggered by the allegations contained in the underlying complaint." BP Air Conditioning Corp.

v. One Beacon Ins. Grp., 8 N.Y.3d 708, 714, 840 N.Y.S.2d 302, 305 (2007). "The merits of the complaint are irrelevant." Id. (citation and quotation omitted). Determination of the duty to defend should not await determination of actual liability in the underlying action. Wausau Underwriters Ins. Co. v. QBE Ins. Corp., 496 F. Supp. 2d 357, 360 (S.D.N.Y. 2007).

In the case at bar, there is no doubt that Old Republic owes a duty to defend. Old Republic does not dispute its Named Insured agreed in a written contract prior to the loss to include Carlyle and 170 Broadway as additional insureds. Burawski has alleged a direct claim against McGowan, Old Republic's Named Insured. Burawski specifically alleges that he suffered "bodily injury" caused, in whole or in part, by McGowan's acts or omissions. He also specifically alleges liability arising out of McGowan's ongoing operations for Carlyle and 170 Broadway. These allegations alone trigger a duty to defend by Old Republic. See, e.g., BP Air Conditioning Corp., 8 N.Y. at 715, 840 N.Y.S.2d at 306.

With respect to the duty to indemnify, if additional insured coverage was predicated solely upon McGowan being sued in the Underlying Action, Wausau concedes the duty to indemnify must await resolution of the Underlying Action, either by settlement or verdict. However, in the case at bar, the injured claimant is an employee of a prospective subcontractor of McGowan. Burawski was visiting the building – the jobsite – as part of McGowan's work on the bidding process. The bidding process was part of the ongoing operations performed for Carlyle and 170 Broadway by McGowan. If Burawski was an employee of an actual subcontractor of McGowan, there would be no doubt as to coverage for both the duty to defend and the duty to indemnify. National Union v. Greenwich, 103 A.D.3d at 474, 962 N.Y.S.2d at 9; Regal Const. Corp., 15 N.Y.3d at 38, 904 N.Y.S.2d at 341; Liberty Mut. Ins. Co. v. Zurich Am. Ins. Co., No. 11 CIV. 9357 ALC KNF, 2014 WL 1303595, at *6 (S.D.N.Y. Mar. 28, 2014). Old

Republic provides no argument or reasoning why a claim by an employee of a prospective subcontractor, visiting the site for the purposes of bidding the job, should be treated differently than the employee of a subcontractor.

Where an employee of a subcontractor of the Named Insured is concerned, fault or negligence is irrelevant. It also matters not whether the claimant was injured while actually performing work. For example, in Turner Const. Co. v. Pace Plumbing Corp., 298 A.D.2d 146, 147, 748 N.Y.S.2d 356, 357 (1st Dep't 2002), Turner Construction Company ("Turner") was sued by an employee of its subcontractor, Pace Plumbing Co. ("Pace"). The employee was injured when he slipped and fell in the construction site bathroom. All claims against Pace were dismissed, as the underlying court held "there is no evidence on the record of any negligence on the part of Pace." Id. at 146, 748 N.Y.S.2d at 357. The New York Appellate Division held that the lack of negligence or fault by Pace was irrelevant, reasoning and holding as follows:

> These determinations notwithstanding, the IAS court properly held that TIG was obligated to provide Turner with a defense **and indemnification** in the underlying action. Defendants' argument that Turner is not entitled to additional insured status for liability that arose due to its own discovery defaults is unavailing because Turner's liability was never adjudicated, and, more to the point, no determination was made that the accident did not arise from Pace's work. Contrary to defendants' argument, Turner has not sought to relitigate decided issues. Indeed, the determinations relied on by defendants have no bearing on whether TIG was required to provide Turner a defense and indemnify Turner pursuant to the additional insured endorsement. Rather, the relevant and previously unadjudicated issues in determining whether plaintiff was entitled to a defense and indemnification under the subject policy's additional insured endorsement were **whether the injured employee's use of bathroom facilities located at the job site was a necessary and unavoidable activity that arose in the course of the construction project and whether the employee's injury therefore arose in connection with the execution of Pace's work for Turner**. These inquiries were properly answered in the affirmative by the IAS court.

Id. at 146-47, 748 N.Y.S.2d at 357. See also Sandy Creek Cent. Sch. Dist. v. United Nat. Ins. Co., 37 A.D.3d 812, 814, 831 N.Y.S.2d 465, 467 (2d Dep't 2007) (held that insurer owed duty to defend where employee fell on ice in the parking lot of the construction site on way to lunch).

In the case at bar, similar to Turner Const. Co. v. Pace Plumbing Corp., Burawski was at the building in the course of McGowan's ongoing operations on the project in connection with meeting with prospective subcontractors for the purpose of obtaining bids. Burawski's use of the bathroom facilities located at the building was a necessary and unavoidable activity that arose in the course of the meeting with McGowan at the project site. Burawski's injury therefore arose in connection with the performance of McGowan's work for Carlyle and 170 Broadway.[3] Based upon these indisputable facts, as in Turner Const. Co. v. Pace Plumbing Corp., it matters not whether McGowan was negligent or at fault for the bathroom condition. Under the terms of its policy, Old Republic owes a duty to both defend and indemnify Carlyle and 170 Broadway pursuant to its additional insured endorsement.

Moreover, the Old Republic Policy nowhere limits coverage to physical construction work. The bidding process was a part of McGowan's operations under the CMA.

The cases Old Republic cites are inapposite. In Worth Const. Co. v. Admiral Ins. Co., 10 N.Y.3d 411, 859 N.Y.S.2d 101 (2008), the underlying claimant was not an employee of the Named Insured or a subcontractor of the Named Insured. The only entity asserting that the Named Insured was responsible for the accident was the party seeking coverage; but, then, even the putative additional insured changed its mind and determined that the Named Insured had no such responsibility for the accident. Id. at 416, 859 N.Y.S.2d at 104 ("Once Worth admitted that its claims of negligence against Pacific were without factual merit, it conceded that the staircase was merely the situs of the accident.") Virginia Sur. Co. v. Travelers Prop. Cas. Co. of Am., 34 Misc. 3d 1216(A), 950 N.Y.S.2d 494 (Sup. Ct. 2012), did not concern a claim by an employee of

[3] This is supported by McGowan's need to prepare an "Incident Report" as a result of the accident. (See Mov. Exh. "6".)

the Named Insured or its subcontractor and granted summary judgment on the duty to defend. Greater New York Mut. Ins. Co. v. Mutual Marine Office, Inc., 3 A.D.3d 44, 45, 769 N.Y.S.2d 234, 236 (1st Dep't 2003), did not concern a claim by an employee of the Named Insured or its subcontractor. Pardo v. Bialystoker Ctr. & Bikur Cholim, Inc., 10 A.D.3d 298, 301, 781 N.Y.S.2d 339, 342 (1st Dep't 2004), does not even involve insurance coverage.

Accordingly, Regal, National Union v. Greenwich, and Turner Const. Co. v. Pace Plumbing Corp., rather than Worth, Virginia Sur. Co. v. Travelers Prop., Greater New York Mut. Ins. Co. v. Mutual Marine Office, and Pardo, are controlling in the case at bar. This Court should hold and determine that Old Republic owes the primary duty to defend Carlyle and 170 Broadway for the Underlying Action and, unless this Court finds a distinction between an employee of a subcontractor and an employee of a prospective subcontractor on the jobsite to bid the job, this Court should determine that Old Republic owes the primary duty to indemnify.

## Point II

## OLD REPUBLIC'S LATE NOTICE ARGUMENT FAILS

Old Republic concedes that it must show prejudice to sustain its late notice defense. N.Y. Ins. Law § 3420(a)(5)(McKinney). Old Republic ignores that it bears the burden of proof. As the New York Insurance Law provides:

> (2)(A) In any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) **the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy**; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy. (Emphasis supplied.)

N.Y. Ins. Law § 3420(c)(2)(A) (McKinney). As this statute makes clear, it is not enough for Old Republic to assert that the notice was six (6) months late to establish prejudice. It must still satisfy its burden of showing actual prejudice, even if notice is as much as 2 years late. Old Republic provides no evidence of any prejudice suffered prior to when it concedes receipt of notice on July 2, 2013.[4] Old Republic provides no evidence of any lost evidence or memories. It identifies no witness that it could not interview after July 2, 2013. Old Republic's claim that it would have settled the claim prior to suit is completely implausible.[5] It denied coverage to Carlyle and 170 Broadway based upon lack of insured status. It continues to deny liability for McGowan. It excused McGowan's own alleged "late notice" based upon that "McGowan would certainly have a reasonable belief that there was no liability or claim against McGowan." (See Opp. Mem. p. 15.) Given the implausibility of Old Republic's argument, it "must come forward with more persuasive evidence to support their claim than would otherwise be necessary" to oppose summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

In contrast, in Atlantic Cas. Ins. Co. v. Value Waterproofing, Inc., 918 F. Supp. 2d 243, 255 (S.D.N.Y. 2013), the insurer provided explicit and substantial evidence and proof of actual prejudice by the delay. The insurer showed that actual evidence was lost between the date when notice should have been afforded and when notice was provided. In addition, the insurer in Atlantic Cas. Ins. Co., unlike Old Republic in the case at bar, did not otherwise assert a lack of coverage. It would have covered but for the late notice.

Old Republic also failed to satisfy its burden of showing that notice was late. The Old Republic Policy, pursuant to its "Knowledge and Notice of an Occurrence Endorsement" provides, in pertinent part, as follows:

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[4] The tender was on behalf of "Owner and its affiliates." Old Republic does not, and cannot, argue that the tender was insufficient for both Carlyle and 170 Broadway. See City of New York v. Lexington Ins. Co., 735 F. Supp. 2d 99, 112 (S.D.N.Y. 2010); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Ins. Co. of N. Am., 188 A.D.2d 259, 261, 590 N.Y.S.2d 463, 465 (1st Dep't 1992).

[5] Old Republic does not assert that it would have provided a coverage and defense if notice was provided earlier. As previously argued, the denial of coverage precludes any claim of prejudice.

> e. Knowledge of an "occurrence," claim or "suit" by the agent, servant or employee of any Insured shall not in itself constitute knowledge by the Insured unless the following individual shall have received such notice from the agent, servant or employee:
>
> Project Manager (unless otherwise specified below)

Old Republic failed to provide any evidence with any alleged "Project Manager" of Carlyle or 170 Broadway received notice of the claim.

Old Republic misunderstands Wausau's waiver argument. Wausau does not base its waiver argument on N.Y. Ins. Law § 3420(d) based upon a failure to timely disclaim. "Rather, plaintiff [Wausau] is relying upon the well settled rule that an insurer's assertion of certain defenses to coverage is deemed *conclusive* evidence of the insurer's intent to waive other unasserted grounds." Olin Corp. v. Insuance Co. of N. Am., No. 84CV1968(TPG), 2006 WL 509779, at *4 (S.D.N.Y. Mar. 2, 2006). See also State of New York v. Amro Realty Corp., 936 F.2d 1420, 1432 (2d Cir. 1991); Aguiree v. City of New York, 214 A.D.2d 692, 694, 625 N.Y.S.2d 597, 599 (2d Dep't 1995); Mutual Redevelopment Houses, Inc. v. Greater New York Mut. Ins. Co., 204 A.D.145, 147, 611 N.Y.S.2d 550, 552 (1st Dep't 1994).

The general reservation of rights in its disclaimer letter does not save Old Republic. MCI LLC v. Rutgers Cas. Ins. Co., No. 06 CIV. 4412 (THK), 2007 WL 2325867, at *9 (S.D.N.Y. Aug. 13, 2007). In MCI, the District Court found waiver although the insurer's letter contained a broad reservation of rights. Id. at *3. A general reservation fails to "timely and clearly inform the insured of where the insurer stands on the issue of coverage for the action, and why, so that the insured can promptly consider appropriate alternatives." Hartford Underwriting Ins. Co. v. Greenman-Pederson, Inc., 111 A.D.3d 562, 563, 975 N.Y.S.2d 736, 737 (1st Dep't 2013).

Old Republic, moreover, provides no evidence that it attempted to investigate the "late notice" issue – even though it knew that the notice was not provided until more than six (6) months after the accident alleged in the Underlying Action. "It is incumbent upon the insurance company to conduct its own prompt investigation." Mayer's Cider Mill, Inc. v. Preferred Mut. Ins. Co., 63 A.D.3d 1522, 1523, 879 N.Y.S.2d 858, 860 (4th Dep't 2009).[6] Old Republic knew the accident occurred on October 23, 2012, and that it first received notice on July 2, 2012. Old Republic provides no information concerning what steps it took to learn or even ask Carlyle or 170 Broadway when it first learned of the accident.

## CONCLUSION

For the above-cited reasons and those set forth in its moving papers, Wausau's motion should be granted in its entirety.

Dated: New York, New York
March 4, 2015

Respectfully Submitted,

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[6] Old Republic may not rely upon the deposition transcripts taken in the underlying action to prove the truth of the matter asserted. They are hearsay. Leading Ins. Grp. Ins. Co. v. Greenwich Ins. Co., 44 Misc. 3d 435, 438, 984 N.Y.S.2d 854, 857 (Sup. Ct. 2014)("no showing here, however, that those deposition transcripts can serve as evidence in *this* action, as to which they are hearsay"); Northwestern Mut. Life Ins. Co. v. Linard, 57 F.R.D. 552, 554 (S.D.N.Y. 1972). These include the deposition transcripts of Adam Burawski and John McMullen, neither of which are signed by the witnesses.